STATE OF MICHIGAN

IN THE SUPREME COURT

DOREEN JOSEPH,

Plaintiff-Appellee,

SUPREME COURT NO.: 142615

-vs-

COURT OF APPEALS NO.: 302508

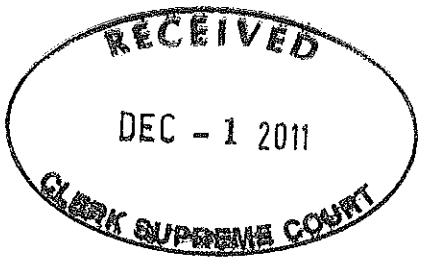
A.C.I.A., LOWER COURT NO.: 2009-005726-CK

Defendant-Appellant,

_____/

BRIEF OF THE MICHIGAN DEFENSE TRIAL COUNSEL (MDTC) AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT A.C.I.A.

PROOF OF SERVICE



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Dated: November 30, 2011

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STATEMENT OF THE BASIS OF JURISDICTION

Amicus Curiae Michigan Defense Trial Counsel (MDTC) concurs in the jurisdictional summary set forth in Defendant-Appellant Auto Club Insurance Association's Brief on Appeal. The jurisdictional summary completely and properly sets forth the basis of this Court's jurisdiction over this matter, given its Order of March 20, 2011, granting Defendant-Appellant's Application for Leave to Appeal, thereby conferring jurisdiction of this matter to this Court pursuant MCR 7.302(C)(1)(b).

STATEMENT OF QUESTIONS PRESENTED

I. Should this Court overrule *Regents of the University of Michigan v Titan Ins. Co., 487 Mich 289, 791 NW 2d 897 (2010)*, inasmuch as the Court's decision failed to recognize the crucial legislatively mandated distinction between the time period for bringing an action, and the statutory periods that limit the damages that can be recovered once an action has been brought?

The Macomb County Circuit Court could not answer this question, as it properly observed that it was bound by this Court's decision in *Regents, supra.*

The Court of Appeals was not given the opportunity to answer this question, given that this Court granted Defendant-Appellant's Bypass Application for Leave to Appeal.

Defendant-Appellant answers this questions, "yes."

Amicus curiae MDTC answers this question, "yes."

Plaintiff-Appellee answers this question, "no."

This Court should answer this question, "yes."

II. Given the fact that care providers have a wholly independent cause of action against a no-fault insurer to recover payment of benefits, regardless of whether the injured party herself commences a claim, did this Court err when it resurrected the Court of Appeals' holding in *Geiger v DAIIE, 114 Mich App 283, 318 NW 2d 833 (1982)* and ruled that the One-Year-Back Rule is tolled with regard to claims filed by competent service providers on behalf of a catastrophically injured individual?

The Macomb County Circuit Court could not answer this question, as it properly observed that it was bound by this Court's decision in *Regents, supra.*

The Court of Appeals was not given the opportunity to answer this question, given that this Court granted Defendant-Appellant's Bypass Application for Leave to Appeal.

Defendant-Appellant answers this questions, "yes."

Amicus curiae MDTC answers this question, "yes."

Plaintiff-Appellee answers this question, "no."

This Court should answer this question, "yes."

THE INTEREST OF AMICUS CURIAE MDTC

As this Court is well aware, the Michigan Defense Trial Counsel Inc. (MDTC) is a statewide organization of attorneys who represent the defense in civil litigation. It exists to enhance its members' awareness and appreciation of ethical and professional standards of conduct and to promote enhancement of the practical and theoretical knowledge base of its members which, in turn, assists them in better representing their clients. The MDTC also exists to develop and maintain positive relations between the legal profession and the public, including a keen appreciation of the separation of powers between the three branches of government. In addition, the association exists to develop, maintain and advance the rights of its members and clients that they represent in civil litigation in the Courts of this state and before the legislature. The association is always looking for cost-effective means to effectuate prompt, fair and just adjudication of civil claims and, as such, its members have an appreciation for the rule of law, as established by the Michigan Legislature and interpreted by judiciary.

In this regard, the MDTC has an interest in the outcome of the instant case, concerning proper application of the One-Year-Back Rule set forth in MCL 500.3145(1). As this Court has previously observed, "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions." *Robinson v City of Detroit, 462 Mich 439, 467, 613 NW 2d 307 (2002).* MDTC concurs in the position taken by Defendant-Appellant Auto Club Insurance Association, to the effect that this Court's decision in *Regents of the University of Michigan v Titan Insurance Company, 487 Mich 289, 791 NW 2d 897 (2010)* is inconsistent with the clear and unambiguous statutory language utilized in MCL 500.3145(1) and MCL 600.5851(1). Accordingly, MDTC supports the position outlined by Defendant-Appellant Auto Club Insurance Association, to the effect that this Court's decision in *Regents* should be overruled. The Legislature's prerogative in balancing the competing policy interests in favor of limiting an individual's right to recover first

party no-fault insurance benefits to those benefits incurred within one year prior to the date of filing suit, a necessary mechanism to keeping No Fault insurance in this state affordable for all, should be given full force and effect.

STATEMENT OF FACTS

Amicus Curiae MDTC concurs with the Statement of Facts set forth by Defendant-Appellant ACIA in its Brief on Appeal. As noted therein, Plaintiff was involved in a motor vehicle accident on June 14, 1977, when she was 17 years old. As stated in Defendant-Appellant's Brief, ACIA has paid more than $4,000,000.00 in first party no-fault insurance benefits. However, Plaintiff filed suit against ACIA in February 2009 seeking to recover payment for the case management services provided by her mother, Marilyn Joseph, presumably dating back to the late 1970s. (Plaintiff-Appellant's Brief on Appeal, page 4-5.) There appears to be no dispute but that even though Plaintiff Doreen Joseph suffers from cognitive impairments, due to her traumatic brain injury, the actual service providers are competent adults, who were fully capable of comprehending their individual legal rights, including their right to file an independent cause of action against ACIA to recover payment for services allegedly rendered within the statutory time frames set forth in MCL 500.3145(1).

As a result, Defendant-Appellant ACIA and, indeed, every other no-fault insurer confronted with a similar situation, will now be forced to defend against decades-old claims for first party no-fault insurance benefits, due to this Court's decision in *Regents of the University of Michigan v Titan Ins. Co., 487 Mich 289, 791 NW 2d 897 (2010)*, which applied the minority/insanity tolling provision set forth in MCL 600.5851(1) to the One-Year-Back Rule set forth in MCL 500.3145(1). The no-fault insurer is placed in the untenable position of having to turn back the clock, determine what was submitted (and what was not submitted) ten, twenty, and even thirty years ago, and what was paid (and not paid) in response. The no-fault insurer also faces the prospect of a substantial interest penalty (12 percent per annum) and possibly no-fault penalty attorney fees if the trier of fact concludes that the no-fault insurer had some indication, in its decades-old claims file, that a benefit was potentially payable, even if the

Plaintiff or service provider had not made a **specific claim** for that particular benefit. (In other words, the no-fault insurer "should have known" that a particular service was allegedly performed decades earlier and should have been paid accordingly, without a specific request for payment being made.) This uncertainty can be avoided if this Court overrules its earlier decision in *Regents, supra,* and defers to the legislative mandate set forth in MCL 500.3145(1), to the effect that the One-Year-Back Rule is to be applied as written.

STANDARD OF REVIEW

The issues involved in this appeal were decided by the Macomb County Circuit Court by way of Motions for Summary Disposition. The lower court properly observed that it was bound by this Court's decision in *Regents, supra,* and denied Defendant-Appellant ACIA's Motion for Partial Summary Disposition, seeking to limit Plaintiff's damages to those benefits incurred within one year prior to filing suit. Defendant-Appellant's Brief on Appeal, page 2. Because only this Court has the authority to revisit its earlier decision in *Regents, supra,* and overrule same, this Court granted Defendant-Appellant's Bypass Application on May 20, 2011. This Court conducts a *de novo* review of a lower court's decision regarding Motions for Summary Disposition. *Spiek v Dept. of Transportation, 456 Mich 331, 572 NW 2d 201 (1998)*; *Simko v Blake, 448 Mich 648, 532 NW 2d 842 (1995).* This case also involves an issue of statutory interpretation. Issues of statutory interpretation are also questions of law that this Court reviews *do novo.* In *Griffith v State Farm, 472 Mich 521, 697 NW 2d 895 (2005)*

LEGAL ARGUMENT

I. In *Cameron v ACIA, 476 Mich 55, 718 NW 2d 784 (2006)*, This Court Recognized The Legislatively-Mandated Distinction Between The Right To Bring An Action And The Damages That May Be Awarded Once An Action Has Been Brought; It Is Incumbent Upon This Court To Reinstate The Legislature's Manifest Intent By Overruling *Regents, Supra*, Which Blurred That Distinction.

This Appeal requires the Court to interpret two statutory provisions, and determine how they interact with one another. The Michigan No-Fault Insurance Act contains a rather unique provision regarding the time periods for filing a claim for benefits, the time period for filing suit and the damages recoverable once suit has been filed. Specifically, MCL 500.3145(1) provides:

> "An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. **However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.** The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury."

As this Court properly observed in *Devillers v ACIA, 473 Mich 562, 702 NW 2d 539 (2005)*:

> "As we noted in *Welton v Carriers Ins. Co. [421 Mich 571, 365 NW 2d 170 (1984)]*, §3145(1) contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered:
>
> (1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of accident, *unless* the insured gives

written notice of injury or the insurer previously paid [PIP] benefits for the injury.

(2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.

(3) Recovery is limited to losses incurred during the one year preceding commencement of the action.

Thus, although a no-fault action to recover PIP benefits may be *filed* more than one year after the accident and more than one year after a particular loss has been incurred (provided that notice of injury has been given to the insurer or the insurer has previously paid PIP benefits for the injury) **§3145(1) nevertheless limits *recovery* in that action to those losses incurred within one year preceding the filing of the action**.

Devillers, 702 NW 2d at 547 (italics in original, emphasis added).

Simply put, in *Devillers, supra,* this Court recognized the crucial distinction between the time period for **bringing an action** and the period for which benefits may be recovered **after the action has been brought**.

Plaintiff-Appellee relies upon the minority/insanity tolling provision set forth in MCL 600.5851(1), which provides

"Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or **bring the action** although the period of limitations has run. This section does not lessen the time provided for in section 5852."

MCL 600.5851(1) clearly and unambiguously states that the time period to "make an entry" [1] or to "bring the action" is tolled during a person's period of minority or period of "insanity," until one year after the removal of the person's minority or "insanity." It says nothing about damages that may be recovered once the action has been brought. This distinction is crucial when examining other statutory provisions, such as MCL 500.3145(1), which specifically limit the damages that can be recovered, once suit has been brought. As this Court often held, when interpreting a statute, the Court must seek to "ascertain and give effect to the intent of the legislature, focusing primarily on the statute's plain language." *Klooster v City of Charlevoix, 488 Mich 289, 795 NW 2d 578 (2011)*; *USF&G v MCCA, 484 Mich 1, 795, NW 2d 101 (2009).* The words of a statute provide the most reliable evidence of what the legislature intended. *Id.* "If the language is clear and unambiguous, no further construction is necessary or allowed to expand what the legislature clearly intended to cover." *People v Breidenbach, 489 Mich 1, 798 NW 2d 738 (2011).*

Unfortunately, in *Regents*, this Court **expanded** the scope of MCL 600.5851(1) to encompass the damages that may be recovered once suit has been filed. Essentially, this Court has judicially amended MCL 600.5851(1) to read:

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[1] In its Brief, Amicus Curiae Coalition Protecting Auto No-Fault (CPAN) argues that the phrases "make an entry" and "make the entry" are broad enough to encompass decades-old claims for no-fault benefits. This argument is easily disposed of by simply examining the very first statutory provision in Chapter 58 of the Revised Judicature Act, MCL 600.5801, which states:

> "No person may bring or maintain any action for the recovery or possession of any lands or **make any entry upon any lands** unless, after the claim or rights to **make the entry first accrued to himself or to someone through whom he claims**, he commences the action or **makes the entry within the periods of time proscribed by the section**.

Clearly, the legislature intended to restrict the phrases "make the entry" and "make an entry" to those situations involving possession of land and no other situations. It is imperative that this Court "consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Sun Valley Foods v Ward, 460 Mich 230, 237 596 NW 2d 119 (1999).* In this regard, it is obvious that when reading Chapter 58 of the Revised Judicature Act as whole, the legislature simply did not want to keep repeating the phrase "upon any lands" after the phrase "make the entry" or "make an entry."

> "Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action **and recover all damages potentially available in that action regardless of any statutory limits** although the period of limitations has run."

The judicial amendment of MCL 600.5851(1) by this Court in *Regents, supra,* was based upon an earlier decision of the Court of Appeals, *Geiger v DAIIE, 114 Mich App 283, 318 NW 2d 833 (1982).* In *Geiger*, the Court of Appeals relied on perceived public policy considerations, not manifest within the statutory language itself, to conclude that the minority/insanity provision set forth in MCL 600.5851(1) tolls the One-Year-Back Rule set forth in MCL 500.3145(1). As this Court has held on a number of occasions, it is the province of the legislature, not the judiciary, to weigh public policy considerations and to take action accordingly. Courts are no longer free to import their own public policy preferences where the language used by the legislature is clear and unambiguous. *Robinson v City of Detroit, 462 Mich 439, 613 NW 2d 307 (2000).* Accordingly, Amicus Curiae MDTC concurs in the position taken by Defendant-Appellant ACIA, and respectfully requests that this honorable Court overrule *Regents, supra,* and reinstate its earlier holding in *Cameron, supra,* which gave proper deference to the clear and unambiguous statutory language of both MCL 500.3145(1) and MCL 600.5851(1).

II Unlike A Claim For Work Loss Benefits, Which Belongs Solely To The Injured Claimant, Claims For "Allowable Expenses," Including Medical Expenses, Attendant Care Service Benefits, and Case Management Services, Belong To The Care Provider; So Long As The Care Providers Have An Independent Cause Of Action Against The Insurer, And Because The Care Providers Are Under No Disability Due To Their Minority Or Insanity Status, The One-Year-Back Rule Applies To Back The Recovery Of Benefits Beyond The One-Year Damage Limitation Provision Set Forth In MCL 500.3145(1).

As noted by Defendant-Appellant ACIA in its Brief on Appeal, medical providers and other caregivers have an independent cause of action against the no-fault insurer to recover payment of "allowable expenses." See *Lakeland Neurocare Centers v State Farm, 250 Mich App 35, 645 NW 2d 59 (2002)*; *Regents of the University of Michigan v State Farm, 250 Mich App 719, 650 NW 2d 129 (2002)*. Simply put, there is nothing that would have prevented the care provider in this case, Marilyn Joseph, from filing suit against Defendant-Appellant ACIA much earlier than she did, to recover benefits that she felt were properly payable to her. She simply failed to do so and, as a result, the One-Year-Back Rule set forth in MCL 500.3145(1) should apply to bar any additional claims for no-fault benefits.

The Court of Appeals' decision in *Geiger*, which was resurrected by this Court in *Regents, supra,* was decided back in 1982, a scant nine years after the No-Fault Act became effective. At that time, it was unclear whether a service provider had an independent cause of action against a no-fault insurer, or whether its claim was wholly derivative of the claim of the injured party. Indeed, this issue was not definitively resolved by the Court of Appeals until 2002, in *Lakeland Neurocare Centers, supra,* and *Regents v State Farm, supra*. For the reasons eloquently set forth by Defendant-Appellant ACIA in its Brief on Appeal, there is no longer any need to continue subscribing to the *Geiger* myth. For those reasons, Amicus Curiae MDTC concurs with the position taken by Defendant-Appellant ACIA and requests that this honorable

Court overrule *Regents v Titan, supra*, and reinstate the rationale enunciated by this Court in *Cameron, supra*.

CONCLUSION

WHEREFORE, Amicus Curiae Michigan Defense Trial Counsel (MDTC) respectfully requests that this honorable Court reverse the trial court in this case, overrule *Regents*, and grant such other relief as may be warranted under the facts and circumstances of this case.

Respectfully Submitted,

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